

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matters of	)	
	)	
Implementation of the Telecommunications	)	
Act of 1996:	)	
	)	
Telecommunications Carriers' Use of	)	CC Docket No. 96-115
Customer Proprietary Information and Other	)	
Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	
	)	
2000 Biennial Annual Review – Review of	)	CC Docket No. 00-257
Policies and Rules Concerning Unauthorized	)	
Changes of Consumer's Long Distance	)	
Carriers	)	

**PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429 of the Commission's rules,<sup>1/</sup> AT&T Wireless Services, Inc. ("AWS") hereby submits this petition for reconsideration of certain aspects of the Commission's *Third R&O* issued in the above captioned proceeding.<sup>2/</sup> Specifically, AWS requests that the Commission reconsider its decision to eliminate its presumption that inconsistent state consumer proprietary network information ("CPNI") requirements will be preempted.

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<sup>1/</sup> 47 C.F.R. § 1.429.

<sup>2/</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; 2000 Biennial Annual Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers*, CC Docket Nos. 96-115, 96-149, 00-257, *Third Report and Order and Third Further Notice of Proposed Rulemaking*, 17 FCC Rcd 14860 (2002) ("*Third R&O*").

## INTRODUCTION AND SUMMARY

Although the Commission now eliminates its presumption that more restrictive state CPNI regulations would be vulnerable to preemption, it does not conclude that the burdens to carriers of complying with multiple state regulatory schemes – which prompted the initial creation of the presumption – are any less severe today than in the past. Rather, the Commission bases its change of direction on its apparent belief that its newly adopted CPNI regime somehow leaves more room for state regulation. This position is flawed because it fails to take into account that the Commission reduced the burdens on carriers in direct response to the Tenth Circuit Court of Appeals’ ruling that the agency’s previous “opt-in” process violated the First Amendment by impermissibly regulating commercial speech. As the Commission recognizes, consumers, as well as carriers, benefit from the carriers’ exercise of more robust commercial speech rights because it gives them easier access to information regarding new products or services and available discounts or more cost-effective service plans. Thus, if anything, the Commission now has an even stronger justification for establishing a presumption in favor of preemption – the United States Constitution – than it did several years ago.

There is no reason to believe that any state will be able to develop a record supporting a different result under the *Central Hudson* test than that reached by the Tenth Circuit or the Commission. To the contrary, given that the Commission relied on evidence supplied by every segment of the telecommunications industry, privacy advocates, and *state regulatory commissions* in performing its cost/benefit/government interests analysis, all indications are that the states would have before them exactly the same record. Because the Commission has found, based on this record, that CPNI rules more restrictive than those it adopted in the *Third R&O*

violate the First Amendment, it is apparent that states, properly applying the same *Central Hudson* test to the same set of facts, would come to the same conclusion.

The constitutional infirmity of more restrictive state CPNI rules is compounded in the wireless context because wireless carriers do not, and cannot, separate their customers into intrastate or interstate categories for CPNI purposes. Accordingly, in states that choose to establish “opt-in” or prior written consent regimes, wireless providers would be forced to comply with unlawful CPNI regimes for *all* services – even those solely within the Commission’s jurisdiction.

## DISCUSSION

When it initially adopted the presumption against inconsistent state CPNI rules, the Commission expressly recognized that “[w]here a carrier’s operations are regional or national in scope, state CPNI regulations that are inconsistent from state to state may interfere greatly with a carrier’s ability to provide service in a cost-effective manner.”<sup>3/</sup> Noting that “restrictive [state] regulations would seem to conflict with Congress’ goal to promote competition through the use or dissemination of CPNI or other customer information,” the Commission concluded that state rules seeking to impose more severe limitations on carriers’ use of CPNI and other customer information than imposed by federal requirements would be “vulnerable to preemption.”<sup>4/</sup> On reconsideration of that decision, the Commission again asserted that state rules that “impose

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<sup>3/</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-149, *Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061, ¶ 16 (1998).

<sup>4/</sup> *Id.* ¶ 18.

additional limitations on carriers' use of CPNI" would be subject to preemption.<sup>5/</sup> Notably, the *Third R&O*, which eliminates the presumption, declines to base that action on any determination that the burdens of complying with different state regimes have lessened. To the contrary, the Commission explicitly acknowledges that "the potential impact that varying state regulations could have on carriers' ability to operate on a multi-state or nationwide basis" cannot be taken lightly.<sup>6/</sup>

The Commission justifies its change of course on its apparent belief that its new, less restrictive rules leave more room for more restrictive state action.<sup>7/</sup> This reasoning is counter-intuitive. The Commission adopted its current CPNI regime because the Tenth Circuit Court of Appeals held that the agency had not justified its prior "opt-in" rules under the First Amendment.<sup>8/</sup> On remand from the court's decision, the Commission developed a comprehensive record, painstakingly applied the *Central Hudson* test<sup>9/</sup> to the evidence gathered, and concluded that opt-in rules for intra-company use of CPNI were indeed unconstitutional.<sup>10/</sup>

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<sup>5/</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-149, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, ¶ 112 (1999).

<sup>6/</sup> *Third R&O* ¶ 71.

<sup>7/</sup> *Id.* ¶¶ 70-71.

<sup>8/</sup> *U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (June 5, 2000).

<sup>9/</sup> *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65 (1980).

<sup>10/</sup> See *Third R&O* ¶ 31 ("[I]n light of *US West* we now conclude that an opt-in rule for intra-company use cannot be justified based on the record we have before us. Thus, we adopt a less restrictive alternative – an opt-out rule – which is less burdensome on commercial speech."); *id.* ¶ 45 ("We find that the same factors [applicable to intra-company CPNI use] weigh in favor of allowing carriers to share CPNI based on opt-out approval with their agents, and with independent contractors (such as telemarketers) and joint venture partners to market and provide communications-related services" on an opt-out approval basis).

The Commission therefore now has a double basis for retaining the presumption against more restrictive state CPNI rules; not only is it justified by the costs that would be imposed by requiring compliance with a multitude of state regulatory regimes, but the Commission's own interpretation of the First Amendment's application in the CPNI context provides a strong reason to ensure that states do not impose undue burdens on carriers' commercial speech.

Nor is there is any reason to believe, as the Commission contends,<sup>11/</sup> that states could justify more restrictive rules by establishing records substantially different from that developed by the Commission. In fact, a number of states provided empirical information in this proceeding that they believed would support stricter CPNI rules.<sup>12/</sup> The Commission reviewed the evidence and rejected the states' arguments. There is no benefit to allowing each state to reassert these flawed arguments or requiring carriers to bear the costs of ensuring that their First Amendment rights are safeguarded on a state-by-state basis.

Moreover, at least in the wireless context, the effects of allowing – or encouraging – unconstitutional state activity would not be restricted to intrastate services. Wireless carriers do not categorize customers as interstate or intrastate and would be unable to do so for the purpose

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<sup>11/</sup> *Id.* ¶ 71.

<sup>12/</sup> See e.g., *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-149, *Ex Parte* Comments of the Texas Office of Public Utility Counsel (Apr. 16, 2002); *Ex Parte* Comments of the Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the Territory of the U.S. Virgin Islands, the District of Columbia's Corporation Counsel, and the Administrator of the Georgia Governor's Office of Consumer Affairs (Dec. 26, 2001); *Ex Parte* Comments of the Attorney General of Arizona (Feb. 4, 2002 and Jan. 29, 2002); Comments of the California Public Utilities Commission at 22-23 (Dec. 13, 2001) ("CA PUC Comments").

of determining the lawful use of CPNI. Accordingly, in any state that chooses to adopt rules more restrictive than the Commission's, wireless providers would have no choice but to comply with the state rules for interstate as well as interstate services. As a result, rather than the carefully-considered CPNI regime adopted by the Commission serving as the default, the unconstitutional state rules would govern *all* carrier uses of CPNI for customers within those states.

The overbroad scope of likely state regulation is vividly demonstrated by the California Public Utility Commission's ("CPUC's") comments in this proceeding. In discussing what mode of customer consent would be necessary to allow the use of CPNI by carriers, the CPUC asserted that "California would consider that any opt-out scheme is not in the public interest since it violates a customer's right to privacy and does not further competition in the telecommunications industry in any significant way."<sup>13/</sup> In fact, the CPUC has issued proposed rules that would, among other things, require opt-in consent prior to the intra-company use of CPNI for communications services unrelated to those already subscribed to by the consumer and require carriers to notify consumers that the carrier must obtain the customer's "affirmative written consent to use CPNI for any purpose other than to provide, or bill for, the service requested by the customers."<sup>14/</sup> Such requirements cannot be reconciled with the Commission's

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<sup>13/</sup> CA PUC Comments at 22-23.

<sup>14/</sup> See *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable To All Telecommunications Utilities*, Rulemaking 00-02-004, *Draft Decision, Appendix B - General Order* (CA P.U.C. June 6, 2002). Rules 12(b) and 12(c)(1) provide that "[i]f a carrier wishes to use confidential subscriber information for a purpose other than the provision of, or billing for service, (e.g., to market a different type of service or other products unrelated to the type of service the carrier already provides that subscriber), the carrier must first obtain the customer's consent, in writing," except for the use of such "information to market . . . additional products related to the type(s) of service the carrier is providing to that subscriber." Rule 12(d) requires that written confirmation orders for services offered on a tariff basis and contracts for non-tariffed services include a privacy notice that includes, among other things, a statement that "the carrier must obtain the customer's

conclusion that requiring opt-in procedures for the use of CPNI for communications services offered by a carrier itself, its agents, joint venture partners, and independent contractors would constitute an impermissible burden on commercial speech.<sup>15/</sup>

As the Commission notes, consumers receive substantial benefits from the ability of carriers to make use of their CPNI – by obtaining easy access to information regarding available services, receiving more personalized offerings (and possible savings), and receiving more tailored and less copious or frequent advertising.<sup>16/</sup> Accordingly, reinstating the presumption against more restrictive state CPNI requirements not only is required under the First Amendment, it would serve the valuable purpose of carrying forward, at the state level, the appropriate balance struck by the Commission between customers’ interest in privacy protection and the need of both parties to be able to communicate freely regarding new service offerings.

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(cont.)

affirmative written consent to use the information for any purpose other than to provide, or bill for, the service requested by the customers.”

<sup>15/</sup> See *Third R&O* ¶¶ 31, 45.

<sup>16/</sup> *Id.* ¶ 35 (noting that the record makes it clear that “a majority of customers . . . want to be advised of the services that their telecommunications providers offer,” “customers are in a position to reap significant benefits in the form of more personalized service offerings (and possible cost savings), and more limited restrictions on the use of information could result in “more efficient and better-tailored marketing, [which has the potential] to reduce junk mail and other forms of unwanted advertising.”) (citations omitted).

## CONCLUSION

For the foregoing reasons, the Commission should reconsider its decision to eliminate its presumption that state CPNI rules more restrictive than the Commission's rules are vulnerable to preemption.

Respectfully submitted,

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October 21, 2002

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## CERTIFICATE OF SERVICE

I, Susan Ferrel, hereby certify that on this 21<sup>st</sup> day of October 2002, the foregoing Petition for Reconsideration of AT&T Wireless Services, Inc. was filed electronically on the FCC's Electronic Comment Filing System and electronic copies were served via electronic mail to the following:

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